In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-961

PHOEBE WILSON DILLON, PETITIONER

v.

ANTLER LAND COMPANY OF WYOLA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-15a) is reported at 507 F.2d 940. The opinion of the district court (Pet. App. B, 1b-25b; Pet. App. C, 1c-2c) is reported at 341 F. Supp. 734.

JURISDICTION

The judgment of the court of appeals was entered November 6, 1974. The petition for a writ of certiorari was filed on February 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Crow Indian, may sue the United States under the Federal Tort Claims Act on the ground that the United States failed to bring suit to set aside her fee patent, which the Secretary of Interior had

issued to her in 1955 in reliance on a false representation by her, or on the ground that the United States failed to sue a subsequent purchaser of the land to set aside the sale as a violation of Section 2 of the Crow Allotment Act of 1920.[1]

STATUTES INVOLVED

The relevant portions of the Act of June 4, 1920 (41 Stat. 751) and of 25 U.S.C. 185, 25 U.S.C. 348, and 25 U.S.C. 349 are set forth at Pet. App. D.

STATEMENT

The case was decided on summary judgment and the facts stated are those assumed to be true by the courts below on the basis of affidavits and admissions (see Pet. App. B, 3b, 22b n.4).

In 1923 and 1924, petitioner, a Crow Indian, received trust allotments totalling 1,040 acres on the Crow Reservation in Montana. Petitioner, and before her the Bureau of Indian Affairs and her father, had leased the land to Matt Tschirgi and later his company, Antler Land Company of Wyola.[2] The leases were such that Tschirgi paid petitioner 5 years' rental in advance and then renewed the leases for an additional year annually (Pet. App. A, 3a; Pet. App. B, 3b-4b).

In 1949, upon her application, petitioner was placed on a list of competent Crow Indians pursuant to the Crow Allotment Act of 1920 (Act of June 4, 1920, 41 Stat. 751), which had the effect of conferring upon her competency status to manage her own affairs (Pet. App.

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[1]The other issues raised by petitioner (Pet. 2-3, 8-16) concern the liability of the non-federal respondents (see n. 8, *infra*).

[2]The district court found Tschirgi to be "the alter ego of Antler Land," and treated his acts as the acts of Antler (Pet. App. B, 23b, n. 6).

A, 3a). According to petitioner's affidavit filed in the district court, Tschirgi[3] asked her in February 1955 to apply for a patent in fee covering the 1,040 acres.[4] Petitioner thereupon filed such an application with the Secretary of Interior, stating that she desired to sell the land and use the proceeds to purchase other land closer to the sheep ranch owned by her and her husband (R. 123). Petitioner falsely stated on her application that she had not been asked to procure a patent in fee (Pet. App. B, 5b-6b).

Petitioner also stated on her application that she had not made an agreement to sell her land (*id.* at 6b). On May 21, 1955, however, while her application was pending, petitioner entered into a written contract to sell the land to Antler Land Company for $7,280 (*id.* at 4b). Petitioner did not notify the Secretary of this contract (*id.* at 6b).[5]

After an investigation, the Secretary approved petitioner's application and on October 3, 1955, a fee patent was delivered to her. On October 6, 1955, she executed and delivered a warranty deed to Antler, receiving $3,711 in cash, the remainder of the $7,280 being deducted for past advances (Pet. App. B, 4b-6b). At the date of the conveyance, Antler owned more than 1,920 acres of grazing land within the Crow Reservation. (All of Antler's successors in interest except respondent Francis Murtha also owned more than 1,920 acres at the time they acquired their interests.) (Pet. App. A, 5a.)

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[3]Tschirgi had died by the time this suit was instituted in 1970 (Pet. App. A, 5a).

[4]Petitioner stated in her affidavit that she needed money at this time and that Tschirgi refused to loan her any except on condition that she apply for a fee patent (Pet. App. B, 4b).

[5]Under the General Allotment Act, 25 U.S.C. 348, the contract would have been considered "null and void" (Pet. App. B, 7b-8b).

On July 20, 1970, nearly fifteen years after the patent and conveyance, petitioner brought this suit in the United States District Court. She sought to set aside the patent in fee and the subsequent conveyance and to obtain damages from the United States for failure to bring suit on her behalf. In support of her first claim, petitioner alleged:

> (1) that she was fraudulently induced by Antler to obtain the patent and sell the land to it at less than its true value;
>
> (2) that while the land was still in trust she was induced by Antler to execute a contract to convey the land to it in contravention of 25 U.S.C. 348;
>
> (3) Antler was absolutely prohibited by statute from purchasing the land because it already owned lands within the Crow Indian Reservation beyond the extent permitted by Section 2 of the Crow Allotment Act, *supra* (Pet. App. A, 3a-6a; Pet. App. B, 2b).

In her second claim she sought damages of $33,000 against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), for violation of its alleged duty to protect her land in accordance with 25 U.S.C. 185 (Pet. App. A, 6a; Pet. App. B, 2b).

The court concluded that in regard to "fraud as it relates to the validity of the deed—there may be a genuine issue of material fact and it cannot be held that the defendants are entitled to a judgment on that issue as a matter of law" (Pet. App. B, 7b). The court held the purchase agreement to have been void and held that if it is shown that it was "a factor inducing the execution of the deed, the deed was voidable" (*id.* at 7b-8b). The court further held that the "deed conveying the land to Antler Land was accepted by Antler Land in violation of Section 2

of the Crow Act and was void" (*id.* at 8b). The court concluded, however, that petitioner's actions to set aside the deed (and presumably to set aside the patent) "are all barred by the Montana Statutes of Limitations" (*id.* at 11b-12b) and adverse possession (*id.* at 16b), and rendered summary judgment for the defendants.The court also held that if the United States had any duty to bring suit to recover the land, that duty was discretionary and not actionable under the Federal Tort Claims Act (*id.* at 17b).

The court of appeals affirmed on essentially the same grounds except that in light of its decision on the statute of limitations it withheld decision on the applicability of Section 2 of the Crow Act (Pet. App. A, 3a-15a).

ARGUMENT

Petitioner argues that 25 U.S.C. 185 imposed a mandatory duty on the United States to litigate this case on her behalf (Pet. 16). That statute by its terms applies to Indian allotments where no patent in fee has been issued. It imposes no mandatory duty on the United States to litigate to set aside a fraudulent patent or a conveyance contrary to law. Even in regard to restricted land, the decision whether to litigate on behalf of an individual Indian is left to the discretion of the government. Thus although 25 U.S.C. 175, a companion statute, states that the "United States attorney shall represent [allotted Indians] in all suits at law and in equity," such representation is discretionary, not mandatory. *Siniscal* v. *United States*, 208 F.2d 406 (C.A. 9), certiorari denied, 348 U.S.

818. Similarly in *Heckman* v. *United States*, 224 U.S. 413, 446, this Court stated:

> In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left under the acts of Congress to the discretion of the Executive Department.[6]

Petitioner's claim against the United States is brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b). That Act specifically provides (28 U.S.C. 2680(a)) that it does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. [Emphasis added.]

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[6]See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, holding that individual Indians are empowered to commence suit to protect their trust lands and recognizing that it is left to the discretion of the United States whether to sue on behalf of Indian owners of restricted land.

The language in *United States* v. *Beebe*, 127 U.S. 338, relied upon by petitioner to find an absolute duty on the government to sue on her behalf (Pet. 17), is both hypothetical and dictum. Moreover, that dictum is inconsistent with the later expressions by the Court discussed above. And in any event, the Court in *Beebe* addressed only those situations "which personal litigation could not remedy" (127 U.S. at 342), such as the wrongful issuance to one Indian of a patent for land that would otherwise have been issued to another Indian.

Nor does *United States* v. *Debell*, 227 Fed. 775 (C.A. 8) (Pet. 18), impose such a duty. There the United States, exercising its discretion to do so, prosecuted an action on behalf of an Indian who wrongfully obtained a fee patent.

The Act thus provides no cause of action under the facts of this case.[7] The decision below dismissing the claim against the United States is correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied with respect to the third question presented in the petition (at p. 3).[8]

Respectfully submitted.

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MAY 1975.

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[7]The United States also argued that the two-year period of limitations under the Federal Tort Claims Act (in effect in 1955, when the United States issued the fee patent to petitioner, Act of April 25, 1949, 63 Stat. 62, 28 U.S.C. (1958 ed.) 2401(b)) barred her suit. The courts below did not reach this issue.

[8]While the United States has not taken a position in this litigation in regard to the two other issues raised by petitioner (Pet. 2-3, 8-16), which concern her suit against the private respondents, we discuss them briefly since the administration of federal statutes may be affected. Petitioner properly points out that in applying the state statute of limitations to bar her suit, the courts below failed to discuss *Ewert* v. *Bluejacket*, 259 U.S. 129, which held that neither a state statute of limitations nor the doctrine of laches barred a suit by an Indian patentee to recover from a non-Indian land that had been sold, with the approval of the Secretary of Interior, in violation of a federal statutory restric-

tion. But see 25 U.S.C. 347 (state statutes of limitations apply to suits by Indian patentees to recover possession of land sold with the approval of the Secretary).

Ewert involved a sale of land with respect to which a trust patent, not a patent in fee, had been issued. See *Bluejacket* v. *Ewert*, 265 Fed. 823, 825 (C.A. 8). We bring to the Court's attention the recent decision in *Capitan Grande Band of Mission Indians* v. *Helix Irrigation District*, No. 73-2956 (C.A. 9) (March 14, 1975), holding that, in regard to a trespass on *trust* land, state statutes of limitations do not apply in suits by Indians and stating (slip op. 4 n.6):

> Our recent decision in Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *aff'g.* 341 F. Supp. 734 (D. Mont. 1972), is distinguishable in that it involved the application of the Montana statutes of limitations to land owned by an Indian in fee simple, which had lost its character as a trust property interest entitled to federal protection.

We should also note that the court of appeals did not decide whether, if petitioner's suit had been considered timely, her sale in 1955 to Antler constituted a violation of Section 2 of the Crow Allotment Act (Pet. App. D, 1d) because Antler at that time owned more than 1,920 acres of grazing land on the reservation. See Pet. App. A, 14a. The district court believed that Section 2 restricted sales by a competent Indian of land patented in fee despite the fact that in such circumstances 25 U.S.C. 349 provides that all restrictions on sale are removed (Pet. App. B, 9b-11b). The district court thought it could not resolve the apparent conflict between Section 2 and 25 U.S.C. 349 by interpreting Section 2 to apply only to trust lands since Section 2 expressly refers to patents in fee. However, it is *possible* to read Section 2 to apply only to trust land or patents in fee held by Indians not judged competent, in which cases the Secretary would have to authorize or approve any sale, as Section 2 appears to contemplate. Read in that way, Section 2 does not conflict with 25 U.S.C. 349.